UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Government,

v.

BILLY ARNOLD,

Defendant.
_____/

HONORABLE GEORGE CARAM STEEH

No. 15-20652

MOTION HEARING

Wednesday, August 21, 2019

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APPEARANCES:

For the Government: MARK BILKOVIC, ESQ.
RAJASH PRASAD, ESQ.
Assistant U.S. Attorney

For the Defendant: ERIC K. KOSELKE, ESQ.
MARIA P. MANNARINO, ESQ.
RICHARD M. JASPER, JR., ESQ.

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Detroit, Michigan

Wednesday, August 21, 2019

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THE CLERK: Case Number 15-20652, United States of America versus Billy Arnold.

MR. PRASAD: Good morning, your Honor. Raj Prasad and Mark Bilkovic on behalf of the United States.

THE COURT: Good morning.

MR. KOSELKE: Good morning, your Honor. Eric Koselke on behalf of Billy Arnold.

MR. JASPER: And Richard Jasper. Good morning, your Honor.

THE COURT: Good morning. Good to see you. And Ms. Mannarino?

MS. MANNARINO: Good morning. Nice to see everybody again. Maria Mannarino also on behalf of Mr. Arnold.

THE COURT: Okay. Welcome. All right. So we're going to be talking about deadlines, and where would you like to start?

MR. KOSELKE: I think we can start with the discovery motion first.

THE COURT: Okay. Have there been some discussions since the motion was submitted?

MR. PRASAD: Not in terms of these motions, Judge. We did agree on certain other extensions that the defense has requested, but not the substance of the discovery motion itself.

THE COURT: Okay. So who is going to address this question first?

MR. KOSELKE: Mr. Jasper will.

THE COURT: Okay.

MR. JASPER: Good morning again, your Honor.

THE COURT: Good morning.

MR. JASPER: Judge, I'm going to address a couple of points upfront about the government's argument, and then Mr. Koselke is going to dive into more detail about it.

THE COURT: Okay.

MR. JASPER: Right from the start I think it is important to understand that death is different and heighten reliability is needed in capital cases is much, much more than rhetoric, and the Supreme Court has stated that time and time again.

One of the things that caught my eye just initially about the government's -- I don't want to say tone. Perhaps position is better -- appears on Page 5 of their main brief. Toward the bottom of the page they cite a case, California versus Ramos, and they quote, the

Court's principal concern has been more with the procedure by which the state imposes a death sentence than with the substantive factors the state lays out before the jury as a basis for imposing death, and that is simply not my understanding.

The Supreme Court has addressed the substantive nature of mitigation, which it has referred to in the case of Ayers versus Belmonte, A-y-e-r-s, B-e-l-m-o-n-t-e. The Supreme Court has stated that mitigation is potentially infinite, that is, the factors are potentially infinite, and actually in the Tennard case which the government, T-e-n-n-a-r-d, the court has mentioned that there are virtually no limits on mitigation.

So I just say that as a backdrop to some of the requests for discovery. It is quite broad. It is literally nothing -- mitigation in a death penalty case is nothing like it is in a non-capital case. This isn't 3553(a) land. It is literally anything that at least one juror -- only takes one -- one juror could find to impose a sentence less than death. That's essentially the Supreme Court's definition of mitigation.

So it's not rhetoric. It is reality, and these are actual statements that the Supreme Court has mentioned time and time again.

I think it is important to mention that upfront

because that concept of what is mitigation is something that we will -- excuse me -- that the Court and the parties will probably be revisiting across time as we deal with different aspects of the case.

And so with that backdrop, Mr. Koselke will address some of our discovery requests.

THE COURT: Okay.

MR. JASPER: I should also say, your Honor -- I'm sorry -- with respect to heighten reliability, although it might not be in the death penalty statute -- and the Ramos case that the government cites is a 1983 case. Many of the mitigations cases like Wiggins versus Smith, and Tennard, are 2003 and 20O6 -- but the notion of heighten reliability has been recognized in this district in the last death penalty case, I think the O'Reilly and any number of cases where the court in order to make sure that the heighten reliability spoken about in the Woodson case is actually effectuated before the court has held hearings when evidence may not be reliable because of the evidentiary standard at the penalty phase, and even at the guilt-innocence phase.

So there is quite a list of cases where courts have reached out and have said yes, I need to make sure that this is reliable given the fact that death is different.

So with that, your Honor, I'll turn it over to Mr. Koselke.

THE COURT: All right. Thank you.

MR. KOSELKE: Thank you, your Honor.

Instead of restating the law and everything in the motion, I just thought the best thing to do is go to points where there is some contention, and I'll start off with the issue of Brady material.

We asked that it be turned over as soon as it is discovered. The government says it will disclose it reasonably after discovery. So there's almost no difference between what we're requesting and what the government is requesting regarding Brady.

Gigilo or Gigilo, however you pronounce it --

THE COURT: I have some interest in this also, and that is, we -- if we follow the turn over by dates that are advanced, we're going to have everything before the Court to be decided still 60 days out from the -- and it's my concern that you might get it off your table, but that, along with dozens of other potential issues are all going to be presented to the Court for a decision by the Court on the eve of jury selection at best.

And in general, the offer to -- or the request to be allowed to file things a certain number of days before

the trial, that would be mean that we would be in the midst of jury selection when these deadlines come and go, and then I've got everything left for me to be decided, argument to be heard. It concerns me that we can't figure out a way of spacing this out a little more efficiently.

I do tend to agree I think with the defense position that 60 days before trial should be 60 days before jury selection starts because that's the trial after all, and you're not going to be getting other things done during that period if we haven't made it clear that these things are due before the jury selection actually ensues.

MR. KOSELKE: And that was a point that I was going to address. We have -- our deadlines are all based on the start of jury selection, because there's no way we can begin to pick a jury appropriately unless we know what the evidence or discovery material is.

In regards to Gigilo or Gigilo, however you pronounce it, the government puts forward two arguments that they should be allowed to disclose it with regard to government witnesses, law enforcement witnesses, 30 days before trial and other days 45 days before trial. Obviously, we ask that this information be turned over as soon as it is discovered.

The government's argument is -- and this goes on

throughout many of their requests -- we know what the evidence is, or we already have it, but we don't know that because at the same time throughout their brief, they're saying well, we may add witnesses.

So a lot of these issues can be resolved if the government would state on the record yeah, we stipulate. We've given you everything. They just go away.

Would the Court like to take a recess in light of what the Court said and talk to the defendant? I hate to do that, but I think we might be able to dispose of things.

THE COURT: That be all right. I have a piece of candy back there that I can take care of.

MR. KOSELKE: Thank you, your Honor.

THE COURT: All right.

(Recess taken.)

(Proceedings resumed.)

MR. PRASAD: Your Honor, if I may, with the understanding that the Court is interested in creating deadlines that include the jury selection date of July 20th, what counsel and I -- all counsel actually were speaking during the break -- was establishing at least

three timelines -- three dates that we can come to an agreement on.

First would be a May 21, 2020 date. That is approximately 60 days before jury selection. On that date we will give defense counsel a preliminary witness list for this case.

Two weeks later on June 5, 2020, we will provide to defense counsel the law enforcement Gigilo.

I just want to make this point, and something that we've discussed with defense counsel, and I reiterated it in our brief. Because there has been two trials in this case, we believe -- Mr. Bilkovic and I believe that when we look at this case, 90 to 95 percent of the case that we would be presenting against Mr. Arnold, is stuff that's already been in front of this Court with witnesses that have already testified before this Court.

What I have explained to defense counsel is that we do look for an updated Gigilo request. So even though there's been previous Gigilo checks and previous Gigilo disclosures from the previous two trials, in which defense counsel has received those disclosures, we are still, even with a new witness list, even though we're talking about 90 to 95 percent of the same witnesses, we're still going to do an update check on it, and make sure there isn't anything new that has come out in the last year that did

not know about earlier.

So we're looking at a June 5, 2020 date for the government to turn over the law enforcement Gigilo, and on June 22, 2020, to turn over the civilian.

June 22nd puts us at approximately 30 days -- I think it's actually 29 days before the start of jury selection. On that date, in addition to the civilian Gigilo, we will also provide a final witness list to the Court and counsel with the one caveat, that we would request the opportunity if something happens unforeseen, that he have the opportunity to approach the Court and counsel say, hey, we thought we were going to have this witness, and it turns out that we have to have this witness instead, and discuss it with the Court and counsel for permission to do so.

THE COURT: Okay. Mr. Koselke?

MR. KOSELKE: And that's what we've agreed to on behalf of Mr. Arnold.

MR. JASPER: Judge, if I might?

THE COURT: Yes.

MR. JASPER: And Judge, we understand that there's been two long trials of co-defendants, non-capital co-defendants, some of whom the government decided not to seek the death penalty against. Our concern simply is that we want to make sure we are doing our job with

respect to that five percent that it is not something that is explosive that we would need to be aware of to make sure that we voir dire on.

So that's why we are concerned about that, but we've spoke to the government about it, and we think that we've worked that out. That's our concern. It's not that we're unmindful that two trials have been conducted with voluminous discovery.

THE COURT: Okay. Thank you.

MR. PRASAD: And part of that, your Honor, in some of the responses that we've done in some of our motions -- and the Court might have seen this -- is that the fact of all the substantive counts, taking -- putting aside the RICO conspiracy count -- all of the substantive assaultive counts that Mr. Arnold is charged with, I believe if memory serves me correctly, there's 31 counts -- all of those counts have had sworn evidence presented in either one or both of the previous trials.

So that's why I say with some confidence that 90 to 95 percent of the evidence has been presented in one form or the other previously in one of two trials.

What we do know, what Mr. Bilkovic and I were talking about, is that some of the evidence in the overt acts of the RICO conspiracy, specifically in terms of some of the drug -- some of the drug overt acts in West

Virginia that may specifically relate to Mr. Arnold, we may not have presented in the previous trials, because as the Court may recall, when it came to West Virginia testimony, because there were so many different things involving different defendants, we tried to tailor each one at each trial to more specifically to those defendants that were involved in those trials.

So we believe that the discovery has been presented in those cases. Counsel has the discovery as to those incidents, but we don't believe that those overt acts may have been presented in the previous trials, some of the drugs involving with Mr. Arnold.

THE COURT: Okay.

MR. JASPER: Your Honor, we understand and appreciate that. Again, our concern is that there's been two prior trials, but when you look at it really, Mr. Arnold was not a party to either one of those trials. He wasn't in the courtroom. Cross-examination was different, and so we just want to make sure that there isn't something that was being held back, not in a negative or bad faith way, but what simply was not necessary for those trials since Mr. Arnold was not a party and present in the courtroom. Obviously, he was mentioned, but it just takes on a whole different perspective with him being the only person in the courtroom, and obviously facing capital

punishment.

So that's concern. We want to make sure that we have that, and you know, it's understandable that as witnesses come in, they wouldn't have been -- on direct examination, the things that wouldn't have come up about Mr. Arnold since he was not on trial, and so, we just want to make sure that we have everything because it's been my view, and I think the view of the experience capital counsel, we do not want the jury to be learning about something at the penalty phase or at the guilt-innocence phase that we have not considered in a questionnaire or voir dire on, because that could impact whether or not we have somebody who is substantially impaired. That's basically how death is different in so many aspects of the trial.

THE COURT: Okay.

MR. PRASAD: Your Honor, some of the topics that Mr. Koselke and I were discussing that we may either -- we want to address just in terms of where we are with those topics, and we may want to ask the Court permission to come back and address those at a later date. If I can turn it over to Mr. Koselke on those.

MR. KOSELKE: I would agree that there maybe two or three topics remaining in dispute over the substance of whether we have a right as oppose to the

dates of what should be turned over, and we may be able to come to an agreement on those issues. We just need more time to work it out.

THE COURT: Okay. So an example?

MR. KOSELKE: The victim's background.

THE COURT: You might be seeing it as mitigating --

MR. KOSELKE: Mitigating.

THE COURT: They might seeing it as aggravating?

MR. PRASAD: We are not seeing it as relevant or applicable in this case because of the facts of what's being presented in this case.

MR. KOSELKE: Another example would be uncharged misconduct of the four other eligible capital defendants.

MR. PRASAD: Also, your Honor, what makes it difficult for us from our perspective, your Honor, is we've tried to -- we've tried to expand the discovery where in certain ways, for example, going to the uncharged conduct of the some of the other capital defendants. In our previous two trials, whenever we would utilize someone's, whether it be a cell phone download or their social media account for trial purposes, we would create a very small -- I don't know, 40, 50, sometimes even a 20

page document that is just a small portion of the entire cell phone download or return from either Facebook or some other social media.

And in the prior trials, we would send each and every one of the defendants and their counsel a letter saying if you want to look at the rest of the items of the other parties and their social media accounts or cell phone downloads, please come to our office, and you're welcome to do so, and we made that option available, and in fact, we even sent a letter like that to Mr. Arnold's counsel probably a year or so ago whenever we sent it to the other counsels.

Understanding that Mr. Arnold's case is going to be different, we actually put all of those other social media accounts, cell phone downloads onto one hard drive and provided it to Mr. Arnold's counsel. Instead of just waiting for them, you know, for an open invitation to come to our office, we thought the better policy at least for Mr. Arnold because we have a year before his case is going to start, let's turned it over to them now so they can have a year to look through it.

So we are mindful of this idea that Mr. Arnold for reasons very specific to just himself will be looking for different evidence, and we're trying to assist as best we can, but -- and this is where Mr. Koselke and I disagree.

Some of the things that they are asking for we don't believe is even relevant or admissible, and so that's why as much as we are trying to help them, and trying too comply with everything that we think is appropriate, some times we will disagree.

MR. KOSELKE: I think the third area has to do with evidence related to unindicted co-conspirators. I think those are the three issues left, and they don't have anything to do with timing. I think we're in agreement on that, and we just a few weeks ago received a big bulk of discovery as he indicated, I think Mr. Bilkovic --

THE COURT: These are the downloads that Mr. Prasad mentioned?

MR. KOSELKE: And there's more to it than that, but yes, and I think the government represented that it was 50,000 pages plus videos, new evidence. Mr. Anton thinks it's conservative, 100,000 pages plus videos. That's the reason these other issues related to the Atkins.

THE COURT: Other issues related to --

MR. KOSELKE: Atkins stipulating.

THE COURT: Okay. So how close to having everything are we as it relates to these massive amounts of material that you have been --

MR. PRASAD: Your Honor, we already provided

it to them. We provided it to them last month. There's nothing else in terms of our view that's outstanding. As any case is before this court, obviously as the process gets closer to trial, if there's something different that we haven't turned over, we will.

MR. KOSELKE: And I think there's some delay in turning over. I don't think there's any bad faith, because we were asking Mr. Sloan. He notified us there was a significant amount of additional discovery I believe in the second week of May. We were asking for it before. I believe he was in numerous trials and in the process of transferring. So we didn't get information until late in relation to the deadline.

THE COURT: Okay. Mr. Sloan is gone?

MR. PRASAD: He is on assignment in the anti-trust unit in D.C.

THE COURT: I see. Okay. So it's going to be the two of you?

MR. PRASAD: And Mr. Wigod.

THE COURT: All right. What else?

MR. KOSELKE: We just have a lot of material.

THE COURT: The basic idea that we're counting back the days from jury selection, you're on board with that?

MR. PRASAD: Well, we objected, but if that's

what the Court wants --

THE COURT: I mean, it would be terrible to be addressing conflicts while in the process of jury selection. So I think we have to treat that as the start of the trial.

MR. PRASAD: Very good. If that's what the Court wants, we will do it.

THE COURT: Great.

MR. PRASAD: Mr. Koselke was asking you openly, do you want to set a date to discuss those other legal issues that we have not agreed on, or do you --

MR. KOSELKE: Let's talk on the phone, and if we need a hearing, we will ask for it. So far we have been able to resolve most of the issues.

THE COURT: Okay. Sounds good.

MR. PRASAD: Thank you.

THE COURT: Is that it for today? What about the jury questionnaires. Are you done with fleshing those out?

MR. KOSELKE: Not at all.

MR. JASPER: Your Honor, I think the final questionnaires are due June 12th. So we will be turning our attention to those. Those are quite critical in a case like this, and your Honor is quite accurate I believe about what we will be able to do once jury selection

starts. It's been my experience that capital jury selections is probably one of most physically draining exercises that one could ever think of. It's that important. Each and every juror is literally -- could be the difference between life and death. It is a pretty intense period of time, and we really won't be able to devote a whole lot to the case once that process has started. We will probably have an upwards of a thousand questionnaires, which we will vet, people at the extremes, people who would never impose death, and people on the other side would always impose life.

So it is a process that we will be working with the government to try to make it easier on the Court and everybody else.

THE COURT: At some earlier point we were talking about jury selection, and it was someone's estimate that we needed 7,000 -- 700. It sounds like 7,000 to me -- but 700 perspective jurors. Is that --

MR. JASPER: I think, Judge, that would be a start. I myself was thinking more along the lines of a thousand. I've been in a case where there was a thousand questionnaires, and another one that was 2,000.

Now the 2,000 was a highly public case in New York City. It was on the front pages a lot. So there was a lot of exposure about that case.

In this situation there have been two -- as your Honor and the government well knows -- two long, I think, three month trials which got a lot of press. So there is that piece to it as well. So it's a death penalty case. It's a gang case, and there may be jurors who were previously exposed to the prior two trials, and that's the only reason I would think going to the higher number.

The other possibility is that we could start with 700, but in my other cases, the judges have had to pick up the phone and call the jury clerk and say I need 250 more. It depends on do you want to err on the side of safety, or do you want to see how it goes, and then call in some more jurors, because a lot of people will be dropping out for one reason or the other.

MR. PRASAD: Your Honor, this is just more for your information and for defense counsel purposes, in terms of the pretrial publicity, I know in terms of picking the jury for the third trial group where the defendant ended up pleading after the first day of jury selection, pretrial publicity did not seem to be a big problem for us in terms of having to weed out too many people because of that.

But the only thing that I would ask the Court is that I don't know what Judge Goldsmith is doing with his jury. They will be picking one I think in March.

THE CLERK: April 21st.

MR. PRASAD: Thank you. I'm just curious. I would like to know what happens with them so it could hopefully guide us if they end up bringing in 700, and if 700 does not seem sufficient, then obviously we would agree with defense that we should have more, but if 700 is sufficient, then we can go from there. I think in that case it is a two defendant case, and ours is a one defendant case.

THE COURT: The questionnaire that you anticipate -- you're anticipating a screening device by this questionnaire. Have you had any discussion about that?

MR. KOSELKE: We have not.

MR. PRASAD: We have not.

MR. KOSELKE: We will.

MR. PRASAD: Yes. We will, Judge, but we have not tackled that. Have you seen the one used in the previous case?

MR. KOSELKE: I did.

MR. PRASAD: Okay.

THE COURT: Okay. So the Atkins timeline, I know that you had a proposed stipulation, but is that now been changed to conformed to what we've been talking about?

MR. PRASAD: We will add the other dates that we've discussed today.

MR. KOSELKE: But that does not change the Atkins date.

MR. PRASAD: Correct. It doesn't change the Atkins date.

THE COURT: All right. Anything else? I don't know if we've solved the basic problem that I perceive having to do with everything crunched together.

MR. PRASAD: There are certain dates closer to trial that we need to move up, certain issues that need to be addressed earlier.

THE COURT: I think that would be helpful if you could identify some things that would be decided on earlier rather than having all of these issues come together on the eve of jury selection.

MR. PRASAD: Currently in our current order, April 17th is noted as the deadline for motions regarding jury selection process, and motions in limine. Is that a -- is that -- that puts us roughly three months ahead of trial. Is that something the Court is looking to move up perhaps, or --

MR. JASPER: I mean, why don't we discuss it. Jury selection is obviously one of the big ticket items that we need to talk about I think in a deliberate

fashion, but it's certainly one thing that we would look to.

I mean, what we would do is suggest or propose to the Court a particular procedure or way about going about selecting the jury, which the Court could then consider, but I think it's something that we could talk about.

I mean, it's August now. We certainly can talk about that. There's very little that's as important as jury selection and the whole process and how we approach it. I think it's something worthwhile that we start talking about in the next couple of weeks. Certainly we need to talk about it.

THE COURT: Okay. So this conference that you are envisioning, the telephone conference -- the telephone discussion that you are going to have, you're intending to undertake in a couple of weeks?

MR. JASPER: We will talk to the government after this conference and see where we are with that, and kick some ideas around. It might not be a whole lot of disputes on the questionnaire itself. It may come down to, in my experience, usually a handful or two of key questions that the Court will decide upon. Usually we can decide upon everything else, but there is usually a couple of key questions that the defense wants and the government objects to. That's been my experience.

But it will be a lengthy questionnaire. It will be a questionnaire that is designed to elicit general and specific forms of bias, you know, do you find police officers always believable? You know, do you have anyone in your family in law enforcement, general bias and specific bias, and then, of course, punishment related questions, which is really the heart of capital jury selection.

MR. KOSELKE: Was the Court's question about jury selection or the three remaining issues that we have to resolve in the next two weeks?

THE COURT: The jury was included in that, but --

MR. KOSELKE: As one of the issues?

THE COURT: Right.

MR. PRASAD: Your Honor, if you would let us in the next couple of weeks discuss it, then we can approach the Court in a couple of weeks with perhaps some earlier timelines for certain issues.

THE COURT: Okay. That sounds like a plan. Anything else?

MR. KOSELKE: Nothing from the defendant.

MR. PRASAD: Nothing from the government.

THE COURT: This telephone conference was with the Court as well involved? If that's the case, we

have Mr. Arnold today, but we wouldn't have him for that telephone conference.

MR. PRASAD: And if that's case, we will make that just a timeline issue as oppose to anything substantive, and we can come back for a substantive hearing if we need it.

THE COURT: That makes sense.

MR. KOSELKE: Defense agrees.

THE COURT: Okay. All right. Appreciate the work.

MR. PRASAD: Thank you.

MR. KOSELKE: Thank you, your Honor.

(Proceedings concluded.)

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C E R T I F I C A T I O N

I, Ronald A. DiBartolomeo, official court reporter for the United States District Court, Eastern District of Michigan, Southern Division, appointed pursuant to the provisions of Title 28, United States Code, Section 753, do hereby certify that the foregoing is a correct transcript of the proceedings in the above-entitled cause on the date hereinbefore set forth.

I do further certify that the foregoing transcript has been prepared by me or under my direction.

s/Ronald A. DiBartolomeo
Ronald A. DiBartolomeo, CSR
Official Court Reporter

_____
Date

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